

Updates

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FTC Proposes Rulemaking for Recurring Subscription Programs



The Federal Trade Commission (FTC) recently announced a [notice of proposed rulemaking](#) to expand its "Negative Option Rule" to apply to all recurring subscription programs (Proposed Amendment). The Proposed Amendment would have a sweeping effect on recurring subscriptions, requiring—similarly to some state laws—clear and conspicuous disclosure of material terms, double opt-ins for sign-ups, a simple cancellation method, and an annual renewal reminder. If approved, the Proposed Amendment would set a nationwide floor by requiring specific practices for subscriptions, but it would not supplant existing state laws addressing recurring subscriptions. The amendment would also greatly expand the FTC's ability to seek penalties and consumer redress for violations.

Background

Adopted in 1973, the current "Negative Option Rule" (Rule) addresses subscription practices occurring by mail—specifically, largely defunct "prenotification plans," where sellers provided periodic notices offering products to participating consumers (e.g., magazines or CDs) and then sent—and charged for—those products if the consumers took no action to decline the offer. The Rule requires prenotification plans to clearly and conspicuously disclose material terms and addresses requirements for rejecting products and honoring cancellation requests. The FTC has only revisited the Rule once—in 2009—but chose not to amend it at the time.

The Proposed Amendment would significantly expand the scope of the Rule to apply to all recurring subscriptions (i.e., beyond merely "prenotification plans") and establish a national standard for recurring subscription compliance programs. The Proposed Amendment would not, however, replace existing state

automatic renewal laws. If the Proposed Amendment is approved, companies will need to assess compliance at both the state and federal levels. The Proposed Amendment is not yet final. Businesses may submit comments to the FTC for 60 days after publication in the *Federal Register*. A few key takeaways from the Proposed Amendment follow.

Scope of Rule and Effect on Penalties

The Proposed Amendment would prohibit any person from misrepresenting, expressly or by implication, any material fact regarding subscription terms, products, or services. The Proposed Amendment would also give the FTC the ability to seek a civil penalty (currently \$50,120 per violation) and consumer redress for any misrepresentation about the subscription transaction or terms or the underlying products or services, including related to costs, product efficacy, free trial claims, cancellation, and more.

Currently, the FTC has limited authority to seek civil penalties under Section 5 of the FTC Act (15 USC 45) (e.g., violation of a consent order or engaging in conduct with actual knowledge that the conduct has been found to be unfair or deceptive via a prior FTC administrative order) and its [ability to obtain monetary relief under Section 13\(b\) was curtailed](#) by a U.S. Supreme Court decision in 2021. The Proposed Amendment reflects the current FTC's efforts to strengthen its ability to seek financial penalties. Commissioner Christine S. Wilson, who [dissented](#) from the Proposed Amendment, cited the broad ability of the FTC to seek penalties as the primary reason.

Disclosure

- **Disclosure of material terms.** The Proposed Amendment would, similarly to certain state laws, require brands to clearly and conspicuously disclose the following information before obtaining consumers' billing information: (1) that consumers will be charged for the product or service on a recurring basis unless a consumer cancels (and that charges will increase after any applicable trial period ends); (2) the deadline by which consumers must act to stop charges; (3) the amount or range of costs that consumers will incur; (4) the date the charge will be submitted for payment; and (5) information about how consumers may cancel the recurring charges.
- **Clear and conspicuous disclosure.** The Proposed Amendment defines "clear and conspicuous" as difficult to miss and easily understandable by ordinary consumers. Select examples follow:
 - In any communication that is solely visual or solely audible, the disclosure "must be made through the same means through which the communication is presented."
 - A visual disclosure must "stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood."
 - For digital communications, the disclosure must be *unavoidable*. A disclosure is avoidable if the consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.
 - Written disclosures should appear immediately adjacent to the means of recording the consumer's consent for the negative option feature (discussed further below).

Consent

- **Double opt-in.** The Proposed Amendment would require that consumers affirmatively consent to the recurring subscription *separately* from any other portion of the offer, *and* also affirmatively consent to the rest of the transaction. In other words, where a sale of a product or service includes a recurring

subscription, brands would need to obtain a consent to the auto-renewal terms separate from the consent to the general terms of service. This type of affirmative consent to the recurring subscription could be obtained through a separate unchecked check box, signature, or other substantially similar method. The consent request would have to be made in a clear and unambiguous manner.

- Brands must not only obtain consent, but must also maintain evidence of this consent for three years after sign-up or for one year after cancellation, whichever is longer.

Cancellation

- **Simple cancellation.** The Proposed Amendment would require brands to provide a simple cancellation mechanism. This means the cancellation process must be (1) at least as simple as the one used to initiate the charge or series of charges; and (2) through the same medium (e.g., if online, then on the website or app) used to initiate the agreement.
- **Additional offers before cancellation ("Saves").** Under the Proposed Amendment, before making upsell or retention offers, brands must first ask consumers whether they want to consider such offers (e.g., "Would you like to consider a different price or plan that could save you money?"). If the subscriber declines, the brand must not present such offers and must cancel the subscription immediately.

Reminders

- **Annual reminders required for subscriptions not involving delivery of physical products.** The Proposed Amendment would require brands to send an annual reminder for recurring subscriptions that do not involve delivery of physical products. The notice would contain the following information: (1) identification of the product or service; (2) the frequency and amount of charges; and (3) the means to cancel. The FTC would require that these reminders be provided through the same medium (e.g., internet, phone, or mail) that the consumer used to consent to the subscription. This amendment is significant, as it would require at least one notice per year, even for month-to-month subscriptions (akin to [Colorado's existing auto-renewal law](#)). The FTC is seeking comment on this proposal, "including, for example, whether the Commission should narrow the coverage of the proposed language by types of covered services or time duration between reminders."

Takeaways

The Proposed Amendment would reflect significant changes to recurring subscription practices in the United States. The FTC has been enforcing against allegedly unfair or deceptive recurring subscription practices under a patchwork of laws that only address certain aspects of these subscriptions, including Section 5 of the FTC Act, the Telemarketing Sales Rule, and the Restore Online Shoppers' Confidence Act. The FTC also previously issued an [Enforcement Policy Statement Regarding Negative Option Offers](#) with guidance about how the FTC views issues regarding recurring subscription disclosures, consent, and cancellation. The Proposed Amendment is the FTC's next step to address what it describes as continued consumer harm when it comes to unfair and deceptive recurring subscription practices.

Companies should keep in mind that even if the Proposed Amendment goes into effect, state automatic renewal laws will still apply, which have also expanded significantly in recent years (see this [2022 Update](#) for examples of recent changes). Companies should closely review their recurring subscription practices and consult with experienced counsel for compliance with evolving federal and state requirements.

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